In the Supreme Court of the United States

OCTOBER TERM, 1924

SANTA FE PACIFIC RAILROAD COMPANY, appellant
v.
HUBERT WORK, SECRETARY OF THE INTERIOR

No. 302

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

STATEMENT

This suit, initiated in the Supreme Court of the District of Columbia, is for an injunction to restrain the Secretary of the Interior from cancelling a selection made by the Santa Fe Pacific Railroad Company of a certain tract of 40 acres in the State of New Mexico, and from any other action with respect to this tract except the issuance of patent therefor to the company.

The bill of complaint discloses the following situation (R. 1–4):

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The railroad company is the successor of the Atlantic & Pacific Railroad Company to which Congress by the Act of July 27, 1866, c. 278, 14 Stat. 292, granted lands in aid of construction of a railroad. The grant was of alternate sections of public lands not mineral, or reserved, sold, granted, or otherwise appropriated, designated by odd numbers to the amount of twenty alternate sections per mile on each side of the road as definitely located through the territories and ten alternate sections through any state (Sec. 3). The word *mineral* in the Act was not to be held to include iron or coal.

By the Act of June 22, 1874, c. 400, 18 Stat. 194 (U. S. Comp. St. 1916, sec. 4889), entitled "An Act for the relief of settlers on railroad lands," it was provided:

> That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the preemption or homestead laws of the United States subsequent to the time at which, by the decision of the land office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise

> appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided,* That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes.

The Act of August 29, 1890, c. 819, 26 Stat. 369 (U. S. Comp. St. 1916, sec. 4890), extended the provisions of this Act to homestead and preemption claims, after residence and improvement for five years, which had not been admitted to record.

Pursuant to this Act the railroad company, on December 1, 1921, filed in the proper local land office an application to select the 40-acre tract in controversy in lieu of a tract of the same area which it had relinquished because of a settlement claim coming within the terms of the Act of June 22, 1874. This filing was accepted by the local land office, but was rejected by the Secretary of the Interior for the reason that the land applied for was embraced in a coal withdrawal, and being coal in character the Act of June 22, 1874, did not authorize its selection or permit the patenting of it; and for the further reason that prior to the filing of the selection Congress had by the Act of February 25, 1920, c. 85, 41 Stat. 437, provided that deposits of

coal should be disposed of by lease only. (Ex. A, R. 5–10.)

The theory of the bill appears to be that, inasmuch as the granting act of 1866 declared that "mineral" should not include coal or iron, the same construction should be given the word in the Act of June 22, 1874, in so far as selections made by appellant are concerned (R. 4).

A motion to dismiss the bill of complaint was interposed by the Secretary, the grounds of which were: (1) Want of equity; (2) that the disposition of public lands of the United States is committed to the Secretary and not to the courts; and (3) that the Secretary in the exercise of the jurisdiction vested in him had determined that under the law the land was not subject to selection because mineral within the terms of the applicable statute, and that his action and construction of the statute were not reviewable by the courts (R. 11). This motion was sustained and the bill dismissed (R. 12); Memo. of Opinion (R. 11–12).

An appeal to the Court of Appeals of the District of Columbia resulted in an affirmance (R. 20). Opinion (R. 17–20), 295 Fed. 982. A further appeal brings the case to this court.

ARGUMENT

I

The jurisdiction of this court

Appellant rests its right to an appeal upon the fifth and sixth paragraphs of section 250 of the Ju-

dicial Code. Those paragraphs provide for a review—

> *Fifth.* In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.
>
> *Sixth.* In cases in which the construction of any law of the United States is drawn in question by the defendant.

It is asserted that the case comes under the fifth paragraph " in that the scope of the power of the Secretary of the Interior over the selection in question as well as the duty of that officer with respect to such selection is directly drawn in question in these proceedings." (Petition for appeal, R. 20.)

We think it clear that the case does not present a question of the scope of the power or duty of the Secretary. There can be no dispute that the Secretary had power to hear and determine the right of appellant to the tract involved. Appellant conceded, by its application to select, the *power* of the Secretary in this regard. Having the power to decide, he had the power to render such decision as he deemed right. Like the jurisdiction of a court, the Secretary's power does not depend upon a correct decision. *Fauntleroy* v. *Lum,* 210 U. S. 230, 235; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 306, 307. A challenge of the correctness of his decision is not a drawing in question of the scope of his power.

Again, the filing of the selection application not only provoked the exertion of the *power* of the

Secretary but also made it his *duty* to determine whether it should be approved. The performance of that duty involved the construction of the applicable law. When he construed the law and rendered his decision the Secretary discharged his duty. Had he asserted that the scope of his duty did not extend to this selection or require action thereon, then this case would be squarely within the terms of the fifth paragraph of Section 250. But the complaint of appellant is not that the duty was not performed but that the result was not to its liking. This, however, did not draw in question the scope of the duty of the Secretary.

The case comes well within the purview of the holdings in *Champion Lbr. Co.* v. *Fisher,* 227 U. S. 445; *Taylor* v. *Taft,* 203 U. S. 461.

To bring the case within the sixth paragraph of section 250 appellant avers (R. 21)—

> that the construction of the Act of June 22, 1874 (18 Stat. 194) is brought in question by the defendant who asserts and relies upon that Act for denial of approval to the selection of the land involved because of supposed coal value in the land.

There is no basis for the assertion that the construction of any law was drawn in question by the Secretary of the Interior, defendant below. The appellant here, plaintiff below, was the party which drew in question the construction of the Act of June 22, 1874. It based its case upon that and the bill of complaint proceeded on the theory that the

construction given the statute by the Secretary was erroneous.

The motion to dismiss disclosed that the Secretary was well satisfied with his construction of the Act. He did not ask the court to construe the Act; on the contrary, the burden of the entire motion is that the court was without jurisdiction to review his construction or action. To say that he drew in question the construction of the law would be to contradict the terms and tenor of the whole pleading.

We therefore submit that the appeal should be dismissed for want of jurisdiction. *United States ex rel. Sykes* v. *Payne,* 254 U. S. 618.

II

The decision of the Secretary was made in the exercise of judgment and discretion and hence is not properly subject to review by the courts

The question presented to the Secretary of the Interior by appellant's application was whether the land selected could properly be approved and patented to the railroad company. To determine that question, it was necessary to construe primarily the Act of June 22, 1874, under which the selection was made, and also the Leasing Act of February 25, 1920. The Secretary construed the first act as not authorizing the selection of coal land, interpreting the word " mineral " as including such land. He also construed the Leasing Act

as prohibiting any disposition of coal lands except as provided in that Act.

The case presented, therefore, is one where the Secretary in the exercise of his undoubted jurisdiction was called upon to administer the law. This required the exercise of judgment and discretion in the interpretation of the appropriate statutes. The rule is well settled that neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion. *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324. The Secretary could not administer or apply the law without construing it, and that involved the exercise of judgment and discretion. *Hall* v. *Payne,* 254 U. S. 343, 347.

The question is not whether the decision of the Secretary was right or wrong but whether his decision, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed and he be compelled to retract it and give effect to one not his own. That question, often considered by this court, has been uniformly answered in the negative. *Ness* v. *Fisher,* 223 U. S. 683, 692.

Where there is discretion, even though its conclusion be disputable, it is impregnable to mandamus. *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549, 555. There is no difference in the application of these principles between cases in mandamus and cases for injunction. Of course were the Secre-

tary's construction plainly erroneous and his action clearly arbitrary, the court would be justified in reviewing his action. But that is not the situation here, for the two courts below have held his action and judgment proper and correct. It is therefore exceedingly difficult to see any basis for a contention that the Secretary acted arbitrarily or that his construction was patently erroneous.

III

The decision of the Secretary was correct

In brief, and limiting it to the railroad company here involved, the Act of June 22, 1874, provided that if the railroad would relinquish, in favor of a settler coming within the purview of the Act, land to which the right of the company had attached, it could select in lieu of the relinquished land an equal quantity of other land " nonmineral " and " not otherwise appropriated at the date of the selection."

It is apparent that this Act was passed for the benefit and relief of the settlers and not for the railroad. It was not in aid or fulfillment of the grant made to the company, for it had received the land which had been granted and hence to that extent the obligation of the government had been met. So far as the company was concerned the Act was not necessary; therefore it is clear that the Act was not supplemental to the grant.

There was no obligation upon the company to invoke the Act. While holding out inducements to railroad companies to relinquish lands upon which

entries or filings had been made, it left them at liberty to relinquish or not as they saw fit. *Hubbard* v. *N. P. R. R. Co.*, 14 L. D. 695, 696.

The Act of June 22, 1874, made lands "nonmineral" subject to selection There was no qualification or definition of that term. If it had been the intention of Congress to have used the term or to define it as excepting coal or iron, as was done in the granting act, it would have been easy to have so declared.

The Land Department never considered the term nonmineral in the Act as permitting coal or iron lands to be selected but construed it in its ordinary meaning.

On that point the First Assistant Secretary in his decision in this case, said (R. 9):

> I find that it has been the uniform policy of the General Land Office to confine such selections to lands not known to contain coal, iron, or other minerals, and that other railroad companies have acquiesced therein by furnishing proofs of the noncoal or iron character of the land, This construction, in my opinion, harmonizes and is in full accord with the language, purpose, and effect of the said act of June 22, 1874.

Now appellant after the Act had been in force nearly fifty years departs from the construction long acquiesced in.

In a circular of November 7, 1879, 2 Copp's Public Land Laws (1882), 715, 721, the following rules were promulgated:

1. When the superior right of the company is ascertained, and it is found that the claim of the settler is such that it would be admitted were the railroad claim extinguished, this office will, in all practicable cases, direct the attention of the officers of the company to the fact, and request an explicit answer whether or not the land will be relinquished.

At the same time it will be well for the party interested to seek for himself the relief indicated,, by direct application to the railroad authorities, and thereby aid in securing a speedy and satisfactory adjustment.

2. Relinquishment may be made by a simple waiver of claim where the patent or its equivalent has not been issued in behalf of the company; but where title has passed, a formal conveyance will be required, as in other cases of the surrender of patents.

3. When making relinquishment, the company will be permitted to name the tract selected as indemnity; and in order that conflict with pending applications may be avoided, such relinquishment and selection should be filed with the Register and Receiver, and be noted upon their records, before transmission to this office.

But in case the company desires to relinquish at once in favor of the settler, and trust to future selections for indemnity, such relinquishment may be sent direct to this office, and upon its receipt will be noted on the books, and the claim of the settler will be immediately released from suspension.

4. The selections must be of lands not mineral, within the limits of the grant and withdrawal, free from other claims, and not reserved or otherwise appropriated at date of selection.

5. Where fees have been paid upon the original selections, they will be applied to the indemnity. Where tracts not yet formally selected are relinquished, fees will be charged upon the indemnity selections.

6. The selections will be reported by the Register and Receiver in the same manner as original selections, with a reference to the act by its date and title; and opposite each tract annotation will be made of the tract surrendered, and the name of the settler in whose favor it is relinquished, with the number of his entry or filing.

And in a later circular of September 22, 1902, 31 L. D. 424, it was said (p. 426):

> Selections must be of lands, not mineral, within the limits of the grant, free from other claims and not reserved or otherwise appropriated at date of selection, * * *.

Again, it is fair argument to say that Congress in enacting this legislation never contemplated that the terms of the granting act, in so far as they defined "mineral," would ever be imported into the 1874 act. The reason is that the lands which the railroad was invited to relinquish were lands upon which homestead or preemption filings had been or could be made. Coal lands were not subject to entry or disposition under those laws, acquisition of such

lands being provided for under R. S. secs. 2347–2352, originally the Act of March 3, 1873, c. 279, 17 Stat. 607.

Since such lands could not be acquired by those for whose benefit the Act of 1874 was passed, it could not have been supposed that the railroad company would relinquish such lands because its action would not help the settler and the purpose of the Act would not be effectuated.

As Congress expected that only agricultural lands would be relinquished, a construction of the Act that would allow coal lands to be taken would be to impute to Congress a purpose to permit to be selected lands of much greater value than those relinquished. The instant case illustrates how such a construction would result for the appellant by its selections, only one tract of which is included in suit, in securing for agricultural land relinquished, coal lands appraised at $133 and $135 per acre! And yet counsel for appellant refers to the " generosity " of the company in relinquishing the base land to the settler. It insists, however, that its generosity have exceeding great reward and of a material kind.

A reference to the legislative history of the bill which became the Act of 1874, as detailed in Southern Pacific R. R. Co., 18 L. D. 275, indicates that equal value between relinquished and selected lands was contemplated. In that case, the Secretary states that the bill as originally drafted by

the Commissioner of the General Land Office, and, as subsequently amended, was passed. He then says (p. 280):

> In transmitting the draft of the bill to Senator Windom, the Commissioner, in a letter dated March 13, 1874, said:
>
> "As an inducement to the companies to so relinquish, the right to select other land in lieu of those surrendered should be secured to said companies. The selections might be allowed from the alternate government sections within the limits of the grant, not otherwise appropriated at the date of selection."
>
> In a letter, dated March 23, 1874, to Hon. J. T. Averill, of the House of Representatives, the Commissioner, in speaking of the proposed bill, said:
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> "After careful study, and from my experience in the examination of this class of claims, I am convinced that the only remedy which can be provided by law is one depending upon, and authorizing the consent of parties to a settlement by which the rights and equities of both parties can be recognized. This may be done by offering an inducement to the railroad companies to relinquish the lands. It seems to me they will, in most cases, gladly avail themselves of an opportunity to secure the good will, and relieve the hardships of actual settlers along their routes, if they can at the same time receive their full compensation in kind for the tracts surrendered, by taking an

> equal amount from the public lands of the government in the same vicinity, and of equal value."

The Secretary then makes this comment (p. 281):

> In view of the clear and comprehensive statement by the Commissioner of the General Land Office as to what lands might be selected by the company as an inducement to the companies to relinquish the lands settled upon, can there be any possible doubt that the clear and expressed purpose of the act was to allow the companies to select an equal quantity of lands "from the alternate government sections within the limits of the grant," in lieu of those surrendered by the companies, "by taking an equal amount from the public lands of the government in the same vicinity and of equal value."

We regard *Northern Pac. Ry. Co.* v. *United States,* 176 Fed. (C. C. A.) 706, as helpful and illuminating here. That case involved a construction of the Act of March 2, 1899, c. 377, 30 Stat. 993, which created the Mount Ranier National park, and by section 3 gave the Northern Pacific Railroad Company authority to select public lands within any state into or through which the railroad ran, equal in quantity to lands within the limits of the Park which had inured to it under its grant and which it might reconvey to the United States. One of the limitations was that the selected lands should be "nonmineral . . . so classified as nonmineral at the time of actual government survey."

The company had selected lands which were then known to be coal lands and patent thereto had issued. In a suit brought to recover the lands the company asserted they had been returned by the survey as nonmineral and therefore rightfully passed to it although known to be coal lands when selected. This contention was rejected, the court saying (p. 708):

> In acts almost innumerable relating to the disposal of the public lands Congress has manifested its consistent and insistent intent that its known mineral lands should be disposed of only in accordance with the provisions of its statutes governing that class of lands.

And—

> The lands authorized by Congress to be taken by the railway company in lieu of lands conveyed by it to the United States must not only have been classified by the government surveyor as nonmineral, but must be nonmineral in fact.

The case was appealed to this court but was dismissed on motion of appellant, 223 U. S. 746.

That case did not present the question here raised but it is important because in the Northern Pacific grant "mineral" did not include iron or coal just as it did not in the grant under which appellant claims; and further because it indicates that the court had no doubt that Congress did not intend that coal lands should be taken under that exchange act, which in many respects is similar to the Act of June 22, 1874.

Now the Act provided not only that the land selected be nonmineral in character but that it be "not otherwise appropriated at the date of selection." By the very terms of the Act, therefore, the availability of the land for selection must be determined as of the date when the application to select is made. Even without this express language the same rule would apply, for it is well settled that under an indemnity or lieu selection no right to a specific tract is acquired until the selection is filed, and the lawfulness of the selection is to be determined as of that time when all the precedent conditions have been complied with. *Payne* v. *New Mexico,* 255 U. S. 367; *Wyoming* v. *United States,* Id. 489.

The word "appropriated" in this Act has from the very first been construed by the Land Department as including "reserved." This is evidenced by the instructions of November 7, 1879, 2 Copp's Public Land Laws, *supra,* par. 4, and those of September 22, 1902, *supra.*

In *Union Pacific Land Company,* 33 L. D. 487, it was held that lands in an abandoned military reservation which by a special Act of Congress had been opened to homestead entry were not unappropriated public lands within the meaning of the Act of June 22, 1874. This decision followed a decision in the case of *State of Utah,* 30 L. D. 301, wherein also a right to select lands in an abandoned military reservation was considered under a statute which allowed selections "from the unappropriated public lands." In the *Utah* case, the Land Department had held that such lands were

appropriated because they were to be disposed of under special Acts of Congress. The Secretary quoted from the opinion in the *Utah* case, the part particularly important here being as follows (p. 488):

> In this sense they are appropriated—not disposed of in the sense of sold or its equivalent, but set apart for disposition in a particular manner in pursuance of a defined policy. This appropriation does not place the lands beyond the power of other disposition by Congress, but so long as it stands unaltered, controls the Secretary of the Interior under whose direction the State selections in question must be made.

The Secretary then said (p. 489):

> The lands involved in this case were, at the time of the attempted selection thereof by the company, "appropriated" in the same sense as were those which the State of Utah applied to select in the above-mentioned case. They were set apart for exclusive disposition "under the homestead laws." Other departmental decisions are practically to the same effect as in the Utah case.

So here, the lands sought to be selected were in 1915, before the relinquishment of the company was made and more than five years before the selection was tendered, withdrawn or reserved for special disposition under the coal land laws. And still more important they, in common with all coal lands, were by the Leasing Act of February 25, 1920, made subject to disposition by leasing and in

that special way only. They were therefore at the date of the filing of the selection " otherwise appropriated " within the meaning of that expression in the Act of June 22, 1874.

Appellant derives a great deal of comfort from *Santa Fe Pac. R. R. Co.* v. *Fall,* 259 U. S. 197, but we fail to see how that case helps it. The point decided was that under the exchange act there considered the Secretary of the Interior must determine the right of the selector to the land as of the time of the application for the selection and could not give consideration to afteroccurring events. It was said (p. 200):

> It is established in the parallel cases of *Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228; *Payne* v. *New Mexico,* 255 U. S. 367, and *Wyoming* v. *United States,* 255 U. S. 489, 496, that the validity of the selection must be determined according to the conditions existing at the time when it was made.

Now the selection here involved was made December 1, 1921. The withdrawals of the land had all been made prior to that date, and the Leasing Act of February 25, 1920, was then operative. The Secretary in deciding the case took into consideration only the status of the land as of the date when applied for. It was not only competent for him to do that, but it was his plain duty so to do.

We think appellant's main difficulty in this case is in confusing the granting act and the Act of June 22, 1874. What the company's rights or privileges were under the granting act is entirely distinct from its rights under the Act of 1874. As we

have already pointed out, the latter Act was not in any way in fulfillment of or supplemental to the granting act; was in no way dependent upon it; and provided for conditions obtaining after the right of the railroad company had vested.

Appellant lays stress upon the provision in the Act of June 22, 1874, which declares that the company is to receive title to the selected land "the same as though originally granted." But the question here is not what kind of title the company is to receive but what kind of land it may receive title to, or, more strictly, whether it shall receive title to land coal in character which has previous to selection been "otherwise disposed of."

The Court of Appeals said on this point (R. 19):

> This refers merely to the kind of title and the avenue through which it shall pass, and does not relate to the quality of land to be selected, or invest the railroad company with any right of selection equivalent to that provided in the original grant. They are words of conveyance, not of power.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals was right and should be affirmed.

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MARCH, 1925.

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